HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

Writ Appeal No.312 of 2007

Between:

Narayani Carriers & Contractors Private Limited,
represented by its Managing Director, Visakhapatnam.

…Appellant

And

The Chairman and Managing Director of the
Visakhapatnam Steel Plant (VSP)/Rashtriya Ispat
Nigam Limited (RINL),
Visakhapatnam and two others.

…Respondents

:: J U D G M E N T ::

Counsel for the appellant : Sri P. Krishna Prakash

19th April, 2007

Per G.S. Singhvi, C.J.

Having failed to persuade the learned Single Judgeto entertain the writ petition filed by it in the matter of termination of contract, the appellant has preferred this appeal under Clause 15 of the Letters Patent.

A perusal of the record shows that the appellant was awarded contract by the management of Visakhapatnam Steel Plant for Erection of Technical Structures, Castings, Piping, Plant & Equipment and Erection Work of Refractaries for Coke Oven Battery No.4 Proper &

Chimney. For this purpose, agreement dated 19-10-2005 was signed by the parties. After commencement of the work, some dispute arose between the appellant and the managementof Visakhapatnam Steel Plant, which culminated in the issue of letter dated 22-1-2007 by General Manager (Project Contracts) for termination of the contract.

The appellant challenged the termination of the contract in Writ Petition No.4841 of 2007 by contending that the action of the management of the Steel Plant is highly arbitrary, unreasonable and unjustified.

In the affidavit by Shri K.A. Patro, Managing Director of the appellant, it was averred that the delay in execution of the project was caused due to the failure of the management of the Steel Plant to make available the required quantities of bricks. It was further averred that despite repeated representations, the concerned authority did not take steps to replace the rejected material and yet, the contract was arbitrarily terminated by respondent No.2.

The learned Single Judge observed that the contract was non-statutory in character and held that the issue raised by the petitioner in the matter of termination of contract can be appropriately adjudicated either by the arbitrator or a Civil Court of competent jurisdiction.

Shri P. Krishna Prakash, learned counsel for the appellant relied on the judgment of the Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corporation Ltd.**[1] and argued that even though the contract between the parties was non-statutory, termination thereof could be questioned under Article 226 of the Constitution of India and the learned Single Judge committed an error by refusing to entertain the writ petition. Learned counsel emphasized that delay in execution of the project was attributable to the failure of the authorities of the Steel Plant to supply the required material and

argued that the appellant cannot be non-suited simply because agreement signed by the parties is non-statutory in character.

We have given serious thought to the arguments of the learned counsel, but have not felt persuaded to agree with him. Rather, we are convinced that the learned Single Judge did not commit any error by refusing to entertain the writ petition.

It is trite to say that in exercise of power under Article 226 of the Constitution, the High Court can interfere even in contractual matters to which State or its instrumentality or its agency or any public authority is a party and if the action of the State or its instrumentality/agency is found to be arbitrary or contrary to public interest, then the Court can annul the same, but it is equally well-settled that in such matters the Court will be extremely slow to interfere in such matters. In **State of U.P. v. Bridge & Roof Co.(India) Ltd.**[2], the Supreme Court was called upon to consider whether the rates quoted by the contractor were inclusive of the sales tax, if any, on the constructional plants, materials and supplies required for the purpose of execution of the contract. The respondent, who was awarded contract for rehabilitation and improvement of certain stretch of road in Uttar Pradesh applied to the Commissioner of Sales Tax, Uttar Pradesh for composition of tax liability. The Deputy Commissioner, Sales Tax, in exercise of the power delegated to him by the Commissioner, passed order dated 27-5-1992 that sales tax should be deducted at the rate of 1% at the time of payment of balance amount. After three years, the respondent filed writ petition in Allahabad High Court questioning the deduction of sales tax. The High Court did not go into the issue of maintainability of the writ petition, but disposed of the same by observing that the Government shall deduct only 1% of the bill in question up to 31-3-1995. While setting aside the High Court's order on merits, the Supreme Court held:

"15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e., in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

17. Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of sub-clause (4) of clause 70 of the contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the civil court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the civil court, as the case may be, according to law. Similarly if the Government says that any overpayment has been made to the respondent, its remedy also is the same.

18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. (See the decision of this Court in **Asstt. Excise Commr. v. Issac Peter**[3] where the law on the subject has been discussed fully.) The writ petition ought to have been dismissed on this ground alone.

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy — in this case, provided in the contract itself — is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 — whether for issuance of mandamus or any other writ, order or direction — was misconceived for the reasons mentioned supra."

In **Kerala State Electricity Board v. Kurien E.Kalathil**[4], the Supreme Court considered the issue relating to maintainability of the writ petition in a contractual matter. The facts of that case were that the appellant, State Electricity Board executed an agreement dated 16-9-1981 with the respondent contractor for construction of a dam. After the

commencement of the work, the State Government revised, by notification dated 30-3-1983, the minimum wages payable to employees employed in the works mentioned in the notification, w.e.f 1-4-1983. The respondent contractor claimed that he began making the revised payments to his workers as required for the period 1-4-1983. Till December 1984, the Board reimbursed the respondent contractor. However, from January 1985 the Board stopped making the payments for labour escalation, contending that construction of a dam was not covered by the notification dated 30-3-1983. This disagreement was settled when the Industrial Tribunal made an award on

14-10-1993, holding that the notification was applicable to dam construction (in case of workers employed for construction or maintenance of roads, or building operations and for stone-breaking or stone-crushing). The award became final. On

23-12-1994 the Board wrote the respondent demanding recovery with interest of Rs.3.65 crores, which had been paid in the form of advances for various heads of work. The respondent filed a writ petition seeking to have the letter of demand quashed and also praying for payment of the amounts paid in revised wages. While the petition was pending, the Board, by an order dated 26-2-1997 terminated the contract, which the contractor challenged by filing another petition. The High Court disposed of both petitions holding that the termination of the contract was arbitrary, unjust and not in public interest and directed the Board to pay the amounts claimed by the respondent along with interest at 18%. The Supreme Court partly allowed the appeal of the Board and held:

> "The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not a writ petition under Article 226. A contract would not become statutory simply

because it is for construction of a public utility and it has been awarded by a statutory body. ……..A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies."

In **State of Jammu & Kashmir v. Ghulam Mohd. Dar**[5], the Supreme Court reiterated the settled rule that a writ of mandamus should not ordinarily be issued for enforcing the terms and conditions of a contract.

In **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** (supra), the Supreme Court reiterated the well-settled proposition that in exercise of power under Article 226 of the Constitution, the High Court can entertain writ petition and even decide disputed questions of fact. The facts of that case were that Rassik Woodworth Limited entered into a contract with M/s.RVO Kazpishepromysyrio, a State owned Corporation of Kazakhstan for

supply of 3000 MT. of tea. The payment for such tea was to be made by the Kazak Corporation by barter of goods mentioned in the schedule to the agreement dated 26.08.1993. The Kazak Corporation assigned a part of the contract to ABL International Limited. On a direction issued by Reserve Bank of India to cover the risk arising out of the export of tea made by ABL International as per the contract, the latter approached Export Credit Guarantee Corporation of India Limited to ensure the risk of payment of consideration in the contract. On 30.09.1993, the respondent issued a comprehensive risk policy. On account of failure of Kazak Government to fulfill the guarantee given by it, ABL International lodged claim before the Export Credit Guarantee Corporation of India Limited. The latter contested the claim by saying that the ABL Corporation had changed the terms of contract without consulting it. After some correspondence, ABL International Limited filed writ petition in Calcutta High Court. The same was allowed by the learned Single Judge. On appeal, a Division Bench of that High Court reversed the order of the Single Bench and held that disputed questions of fact cannot be adjudicated by the High Court under Article 226. On further appeal, the Supreme Court referred to the earlier judgments in **K.N. Guruswamy v. State of Mysore**[6], **D.F.O. v. Ram Sanehi Singh**[7], **Ramana Dayaram Shetty v. International Airport Authority of India**[8], **Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.**[9], **LIC of India v. Escorts Ltd.**[10], **State of U.P. v. Bridge & Roof Co. (India) Ltd.**[11], and **State of Bihar v. Jain Plastics and Chemicals Ltd.**[12], followed some of them, distinguished the other judgments and laid down the following propositions:

1) While entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue

prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case has a discretion to entertain or not to entertain a writ petition. The High Courts have however imposed upon themselves certain restrictions in the exercise of this power. This plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless the impugned action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the High Court thinks it necessary to exercise the said jurisdiction.

2) Unless the action challenged in the writ petition pertains to the discharge of a public function or public duty by an authority, the courts will not entertain a writ petition which does not involve the performance of the said public function or public duty.

On merits, the Supreme Court held that Export Credit Guarantee Corporation of India Limited is an instrumentality of the State, inasmuch as, it discharges the functions of the government and acts as an agent of the government and its action do have a touch of public function or discharge of a public duty and, therefore, it could not act arbitrarily in the matter of repudiation of contract.

In our considered view, the judgment of the Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** (supra) does not have any bearing on the adjudication of this appeal. I n **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** (supra), the Supreme Court granted relief to the appellant because, on facts, it was found that an instrumentality of the government in discharge of its public law obligation had acted arbitrarily. In the case before us, the contract entered into between the parties does not have anything to do with the public law obligation of the State or governmental functionaries. It is a matter of plain and simple contract between the parties. The question whether the

appellant is responsible for delay in execution of the project or the management of the Steel Plant is to be blamed for non-supply of the material is a question of fact which can be appropriately adjudicated by the Arbitrator to whom the dispute can be referred. In the alternative, the appellant can avail remedy by filing civil suit. In either of these proceedings, the parties can adduce evidence in support of their respective stands. However, there is no warrant for undertaking this exercise under Article 226 of the Constitution of India.

We are further of the view that once the parties have agreed to choose a particular forum for redressal of their grievances, they cannot wriggle out from the contractual obligation and seek intervention of the Court by invoking constitutional remedies.

In the result, the appeal is dismissed.

As a sequel to dismissal of the appeal, WAMP.No.601 of 2007 filed by the appellant for interim relief is disposed of as infructuous.

G.S. SINGHVI, C.J.

19th April, 2007

C.V. NAGARJUNA REDDY, J.

svs

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[1] (2004) 3 SCC 553
[2] (1996) 6 SCC 22
[3] (1994) 4 SCC 104
[4] (2000) 6 SCC 293
[5] (2004) 12 SCC 327
[6] AIR 1954 SC 592
[7] (1973) 3 SCC 864
[8] (1979) 3 SCC 489
[9] (1983) 3 SCC 379
[10] (1986) 1 SCC 264

[11] (1996) 6 SCC 22

[12] (2002) 1 SCC 216